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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. DAVON LOUIS DEHUGHES, Defendant and Appellant.	C077959 (Super. Ct. No. 13F7660)

Defendant Davon Louis DeHughes was convicted by jury of possession of three controlled substances for sale, i.e., heroin, hydrocodone, and methamphetamine (Counts 1-3), possession of concentrated cannabis (Count 6), possession of marijuana for sale (Count 7), possession of a controlled substance with a firearm (Count 4), and possession of a firearm and ammunition by a convicted felon (Counts 5 and 8). With respect to the first three counts, the jury also found defendant was personally armed with a firearm. In a bifurcated hearing, defendant admitted he was previously convicted of a strike offense within the meaning of the three strikes law, he served four prior prison terms, and he had

two prior narcotics convictions. The trial court sentenced defendant to serve an aggregate determinate prison term of 30 years 8 months.

On appeal, defendant contends: (1) Proposition 47 requires reduction of his possession of concentrated cannabis conviction to a misdemeanor; and (2) we must remand the matter for resentencing because (a) the record suggests the trial court believed it had no discretion to impose concurrent terms on Counts 2, 3, and 6, and (b) the trial court failed to state reasons for imposing the upper term sentence on the arming enhancement.

We disagree and affirm. As we explain, Proposition 47 does not permit this court to reduce defendant's possession of concentrated cannabis conviction to a misdemeanor. Instead, in order to have this conviction reduced, he is required to comply with the terms of Penal Code section 1170.18, enacted by the voters as part of Proposition 47, by filing a petition for recall of sentence in the trial court once his judgment is final.[1] Nor are we required to remand the matter for resentencing. The record does not suggest the trial court believed it had no discretion to impose concurrent terms on Counts 2, 3, and 6. Finally, any assumed error on the part of the trial court in failing to separately state reasons for imposing the upper term on the arming enhancement does not require remand for resentencing because there is no reasonable probability defendant would obtain a more favorable sentence on remand.

FACTS

Our resolution of this appeal does not require a detailed recitation of the facts underlying defendant's convictions. For our purposes, it will suffice to state that during a probation search of defendant's house in Redding, law enforcement officers found in a closet near the laundry room a black zippered pouch containing about 26 grams of heroin,

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[1] Undesignated statutory references are to the Penal Code.

about 18 grams of methamphetamine, about 12 grams of concentrated cannabis, five hydrocodone pills, and six other pills that were likely ecstasy. The street value of these narcotics was over $3,000. Also inside the closet was a loaded .22 caliber handgun. Defendant's cell phone was also searched and found to contain numerous text messages relating to the sale of various narcotics.

DISCUSSION

I

Proposition 47

Defendant contends Proposition 47 requires this court to reduce his felony possession of concentrated cannabis conviction to a misdemeanor. He is mistaken.

"On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act . . . , which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 enacted section 1170.18. (*Ibid*.) Subdivision (a) of this section provides that "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense *may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing* in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." (§ 1170.18, subd. (a), italics added.)

As this court has previously held, section 1170.18 provides the sole means by which a defendant can seek resentencing under Proposition 47. "Defendant is limited to the statutory remedy of petitioning for recall of sentence in the trial court once his [or her] judgment is final, pursuant to . . . section 1170.18." (*People v. Noyan* (2014) 232

Cal.App.4th 657, 672; see also *People v. Shabazz* (2015) 237 Cal.App.4th 303, 309 ["the voters have expressly enacted procedures to permit the retroactive application of those portions of Proposition 47 which reduce certain felonies to misdemeanors" and "have not expressed an intention to permit us on *direct appeal* to reduce . . . felony convictions to misdemeanors without the filing of an application"].) Defendant acknowledges these cases are "at odds" with his argument on appeal, but asserts they "were wrongly decided" for a number of reasons. We decline to reconsider our conclusion that a defendant must comply with the statutory requirements enacted by the voters in order to have a felony conviction reduced to a misdemeanor.

Nor does this conclusion result in a denial of equal protection of the laws. Defendant argues that "[t]hose sentenced on or after November 5, 2014, will be automatically eligible for immediate relief, while those sentenced before that date, even two days before like [defendant], will be required to petition for relief under . . . section 1170.18. There is no legitimate interest in distinguishing between these two groups. Denying [defendant] the benefit of the new law will constitute a legislative classification which is not reasonably related to a legitimate public purpose." Not so. First, we are not denying defendant the benefit of the new law. As we have explained, section 1170.18, subdivision (a), requires defendant to file a petition for recall. We are therefore providing defendant with precisely the benefit the new law provides.

Second, while Proposition 47 does create two classes of defendants, i.e., those who are sentenced after its effective date and those sentenced before that date, the latter group being required to file a petition for recall of the sentence already imposed, we cannot conclude this distinction amounts to a denial of equal protection. Indeed, had the new scheme denied retroactive effect altogether, this would not have deprived defendant of equal protection. " 'The Legislature properly may specify that [ameliorative] statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect

by carrying out the original prescribed punishment as written.' [Citations.] The voters have the same prerogative. [Citation.]" (*People v. Floyd* (2003) 31 Cal.4th 179, 188.) Here, rather than deny retroactive effect, the voters simply specified the mechanism by which those already sentenced may reap the benefits of the new law. As the Attorney General observes: "A determination of whether someone qualifies for misdemeanor sentencing will, in some cases, depend on factual issues such as the existence of disqualifying prior convictions. The electorate could [have] reasonably decide[d] that for persons sentenced prior to the passage of Proposition 47, the only way to obtain a sentence reduction should be through a petition for recall of sentence submitted to the trial court, which can then make the necessary factual determinations." We conclude the creation of such a procedure for those already sentenced does not deprive defendant of his right to equal protection of the laws.

Accordingly, we reject defendant's assertion that we must reduce his felony conviction for possession of concentrated cannabis to a misdemeanor under Proposition 47.

II

Sentencing Issues

Defendant also claims we must remand the matter for resentencing because (a) the record suggests the trial court believed it had no discretion to impose concurrent terms on Counts 2, 3, and 6, and (b) the trial court failed to state reasons for imposing the upper term on the arming enhancement. We conclude remand for resentencing is not required.

A.

Imposition of Consecutive Terms on Counts 2, 3, and 6

As mentioned, the trial court imposed an aggregate determinate prison term of 30 years 8 months. This sentence was comprised of 8 years for Count 1 (the upper term

sentence of 4 years, doubled), plus 11 years for the enhancements attached to this count (5 years for the arming enhancement, plus 6 years for the narcotics prior enhancements (3 years each)), plus 4 years for the prior prison term enhancements (one year each), plus a consecutive term of 2 years for Count 2 (one-third the middle term of 3 years (one year), doubled), plus consecutive terms of 16 months for Counts 3 and 6, respectively (one-third the middle term of 2 years (8 months), doubled), plus 3 years for a separate narcotics prior enhancement attached to Count 3.[2]

As defendant correctly observes, the three strikes law did not mandate imposition of consecutive sentences on Counts 2, 3, or 6 because his current felony convictions were "committed on the same occasion" and "ar[ose] from the same set of operative facts." (§ 1170.12, subd. (a)(6); *People v. Lawrence* (2000) 24 Cal.4th 219, 223 ["consecutive sentences are not mandated . . . if all of the current felony convictions are either 'committed on the same occasion' or 'aris[e] from the same set of operative facts'"].) Rather, the trial court possessed discretion to impose either consecutive or concurrent sentences on these counts.

Defendant argues, "the record shows it is reasonably likely the trial court did not accurately understand its concurrent/consecutive sentencing discretion." This argument is belied by the record. After discussing the aggravating circumstances justifying imposition of an upper term sentence on Count 1, which we set forth more specifically immediately below, the trial court imposed sentence on Count 2 as follows: "For the sentence on Count 2, I am going to impose two years consecutive, and *all these sentences should be consecutive*. To be clear, whether I inadvertently fail to mention it or not, *that's my intention*." (Italics added.) Had the trial court believed it was required to impose consecutive sentences under the three strikes law, there would be no need to

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[2] Sentences imposed on Counts 4, 5, 7, and 8 were stayed pursuant to section 654.

announce its "intention" to impose consecutive sentences, as opposed to its obligation to do so. Nor is "should" a word indicating a false belief consecutive sentences were required. Quite the contrary. That these lines indicate the trial court was aware of its sentencing discretion with respect to imposing consecutive or concurrent sentences is bolstered by the fact defendant's trial counsel specifically asked the trial court "to *exercise its discretion* and have a lot of these drug offenses be concurrent time rather than consecutive time." (Italics added.) The prosecutor did not challenge defense counsel's correct assertion the trial court possessed discretion to run the sentences concurrently. There is nothing in the record indicating the trial court sentenced defendant under the mistaken belief it was required to impose consecutive sentences under the three strikes law. We must therefore reject defendant's claim to the contrary.

B.

Imposition of the Upper Term Sentence on the Arming Enhancement

Before imposing the upper term sentence on Count 1, the trial court stated: "In selecting the aggravated term, I did go through the factors in aggravation which were laid out on page 18 and 19 from the Probation Department. I do . . . find you were armed with or used a weapon at the time of the commission of the crime. . . . [¶] I agree with [the prosecutor]. As things go, this crime involved a large quantity of contraband. . . . [Y]our prior convictions as an adult are numerous. In my view, they are of increasing seriousness. You have served a prior prison term. As a matter of fact, more than one. You were on probation or parole community supervision at the time this crime was committed, and your prior performance on probation or parole has been abysmal, to say the least. [¶] . . . [¶] [A]ny one of these factors in aggravation standing alone would be more than enough to impose the aggravated sentence on you given the facts of the case before me." After finding "no factors in mitigation," the trial court imposed the upper term sentence on Count 1 and then imposed the enhancement terms attached to that

count, including the upper term of five years for the arming enhancement. (See § 12022, subd. (c).)

Defendant argues the trial court was required to state separate reasons for imposing the upper term for the arming enhancement, relying on California Rules of Court, rule 4.428[3] and *People v. Zamarron* (1994) 30 Cal.App.4th 865 (*Zamarron*). The Attorney General argues the claim is forfeited by defendant's failure to make a timely objection in the trial court. A similar forfeiture argument was made and rejected in *Zamarron*. (*Id*. at p. 870.) We need not decide whether we agree with *Zamarron* on the forfeiture issue. Even assuming the issue is properly preserved and error occurred, remand for resentencing is not required because "it is not reasonably probable that resentencing would result in a sentence more favorable to defendant." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 155.) The trial court listed a number of aggravating circumstances justifying the sentence imposed. (See rule 4.421(a)(2) ["defendant was armed with or used a weapon"], (a)(10) ["crime involved a large quantity of contraband"], (b)(2) ["defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness"], (b)(3) ["defendant has served a prior prison term"], (b)(4) ["defendant was on probation or parole when the crime was committed"], (b)(5) ["defendant's prior performance on probation or parole was unsatisfactory"].) Defendant's parole status alone would have been sufficient to justify the upper term for the arming enhancement. (See *People v. Hall* (1994) 8 Cal.4th 950, 963-964.)

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3 Undesignated rule references are to the California Rules of Court.

Rule 4.428 povides in relevant part: "If an enhancement is punishable by one of three terms, the court must, in its discretion, impose the term that best serves the interest of justice and state the reasons for its sentence choice on the record at the time of sentencing."

Simply put, with so many aggravating circumstances from which to choose, we cannot conclude there is a reasonable probability the trial court would impose a lesser sentence on remand.

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
HULL, Acting P. J.

/s/
RENNER, J.